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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

O R D E R

Cr. No. 03-428(ARR)

- against -

ANTHONY MATHISON,

Defendant.

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ROSS, U. S. District Judge:

On May 4, 2005, the United States Court of Appeals for the Second Circuit, upon defendant's motion, with the consent of the government, to remand the case to determine whether to re-sentence defendant, remanded the case to me for further proceedings in conformity with United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). Upon review of the record of the sentencing proceeding in preparation for the Crosby remand proceeding, it became evident that, at the time of sentence, defendant argued that mandatory application of the Sentencing Guidelines was unconstitutional in his case under the Sixth Amendment of the Constitution, as the two level enhancement applied at sentence for possessing a firearm with an obliterated serial number was neither admitted by defendant at his plea allocution nor found by a jury, citing Blakely v. Washington, 542 U.S. 496 (2004). See Letter of Donna R. Newman, dated August 17, 2004, and Transcript of Sentencing Proceeding, dated September 27, 2004, at 7 and 11-12. Because the defendant properly preserved his Constitutional objection to judicial fact-finding, he

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is entitled to a re-sentencing proceeding. See United States v. Fagans, 406 F.3d 138, 142 (2d Cir. 2005) (remand for re-sentencing where statutory objection to mandatory use of the Guidelines properly preserved).

Accordingly, if defendant wishes the Probation Department to update the pre-sentence report, counsel should make that request of the Probation Department within seven (7) days of the date of this order. If the parties wish to make any further sentencing submissions, they should be served and filed, with courtesy copies to chambers, within fourteen (14) days of the date of this order, or within seven (7) days of an updated pre-sentence report, if such a report is prepared. The re-sentencing proceeding will be scheduled following receipt of these materials.

SO ORDERED:

Dated: Brooklyn, New York
November 2 2005

Allyne R. Ross
United States District Court

COPIES MAILED TO:

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